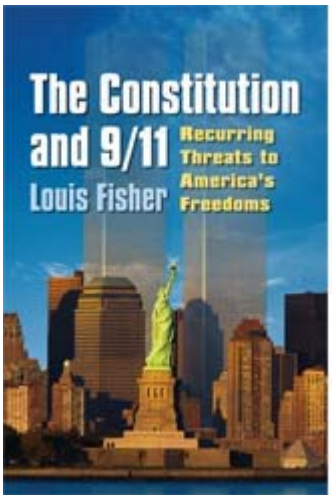
The Constitution and 9/11: Recurring Threats to America's Freedoms



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THE CONSTITUTION AND 9/11: RECURRING THREATS TO AMERICA'S FREEDOMS, by Louis Fisher. Lawrence, KS: University Press of Kansas, 2008. 384pp. Cloth. $45.00. ISBN: 9780700616008. Paper. $19.95. ISBN: 9780700616015.

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The distinguished constitutional scholar Louis Fisher turns his attention to the constitutional law of national security in the most recent of his many books. THE CONSTITUTION AND 9/11 is divided into two parts. The first is a survey of the responses by presidents, Congresses, and courts to perceived threats to national security from the nation's beginning through the end of the Cold War. The second examines several topics that have been – and will continue to be – central to the constitutional law of national security after 9/11. The book's strength lies in its brisk but thorough recounting of important incidents in U.S. constitutional history, making accessible to today's readers the facts of events some of which have almost been lost to lawyers' memories. The book does not, and does not purport to, offer comprehensive legal analyses of contemporary constitutional issues. Fisher expresses his opinions along the way – he is a strong supporter of congressional involvement in determining national security law, and a strong critic of President George W. Bush's failure to engage with Congress – but readers looking for legal analysis as thorough as Fisher's historical presentations will have to go elsewhere. Even with this limitation, THE CONSTITUTION AND 9/11 is likely to serve students and scholars well through its presentation of facts relevant to legal analysis.

Fisher begins in Great Britain, where many U.S. constitutional rights originated. He describes the trials of John Lilburne and William Penn, for example (pp.8-10), and stresses how civil liberties emerged in large measure from Parliament's insistence on involvement in determining how perceived threats to national security should be met. He emphasizes in particular the role of juries and, even more, of openness in criminal trials in securing liberty, and the limited scope of exceptions to trial openness in Great Britain before 1789 (pp.24-28). A chapter on the law dealing with government secrecy follows, with some concluding comments on "when secrecy brings harm" (pp.49-59) by confining information and decision-making to a small circle within the executive branch, thereby depriving decision-makers of input from those whose questions might lead to better outcomes. It should be noted that in this discussion Fisher says little about the possibility that expanding the circle of those with relevant information might lead to damaging leaks (and that the balance between information-sharing and secrecy might therefore be closer than he suggests), or about the possibility that sharing information with people less qualified to understand and evaluate it might degrade the quality of decision-making.

The succeeding chapters are mainly historical. Fisher's discussion of [*1075] responses to perceived threats in the early Republic and the *ante bellum* period has an especially clear discussion of the Alien and Sedition Acts (pp.72-82), probably as good a short presentation as there is anywhere. The chapter dealing with the period from the end of the Civil War to the beginning of World War II is something of a grab bag, focusing primarily on the treatment of "undesirable" immigrants but also taking up BUCK v. BELL (1927), the infamous Supreme Court case on compulsory sterilization of the mentally "unfit." The final historically oriented chapter deals with sedition trials during World War II (pp.131-38), once again presenting material that has often been overlooked in discussions of national security law, and discusses the Japanese internment during World War II and the Cold War loyalty-security programs affecting federal employees.

The second part of the book begins with a crisp history of the uses that have been made of military tribunals to deal with domestic and foreign enemies. Fisher argues perhaps somewhat too forcefully that, although military tribunals with rules different from those used in trials in the ordinary ("civil") courts have been common in U.S. history, they have always been characterized by a reasonably high degree of due process (at least, relative to the standards prevailing at the time in the civil courts) and, more important, that they have always been authorized and regulated in some detail by Congress. For Fisher, the Bush administration's efforts to implement military tribunals without substantial congressional participation represent a departure from historic patterns. The chapter on military tribunals concludes with accounts of the cases of Yaser Hamdan (pp.190-97) and Jose Padilla (pp.197-209), filled with helpful detail.

Chapter 7 takes up issues associated with the detention facility at Guantanamo Bay and the three Supreme Court cases dealing with those issues. Fisher focuses first on allegations of abusive practices at the facility, including coercive interrogation techniques amounting in some instances to torture by any reasonable definition, and then deals with court decisions subjecting detention to some degree of judicial supervision. Occasionally Fisher's accounts of legislative maneuvering provide a bit too much detail, with the forest being lost in the trees of stories about proposed amendments, their rejection, substitutes for them, and more. But overall the chapter gives readers a reasonably good picture of what is at stake in the maintenance of detention facilities since 9/11.

As a preliminary to his treatment of the surveillance programs operated by the National Security Agency (NSA), Fisher describes the development of the general "state secrets" privilege. Some of the cases described in this chapter are reasonably familiar, at least to specialists. So, for example, Fisher summarizes the litigation leading up to and following from UNITED STATES v. REYNOLDS (1953), in which the Supreme Court recognized a particularly strong and – from the point of ordinary citizens—damaging form of the state secrets privilege. He also retrieves more obscure cases, including the captivating series of cases in which spies who had not received what the government promised them sued the government for breach of contract (pp.255-61). [*1076]

Fisher concludes with two chapters on highly classified programs, relying heavily on what has appeared in newspaper accounts and, to some extent, in legislative investigations. Chapter 9 deals with the NSA surveillance program, in which the Agency engaged in some sort of interception of communications from some people to others. That vague formulation indicates one of the difficulties with the chapter (and the following one as well). At present we know about the NSA surveillance program from leaks and incomplete investigations, and we do not know exactly what the NSA did – what the agency's criteria for surveillance were, exactly what sorts of communications were intercepted, and the like. What we do know is that the NSA did not follow the statutory procedures laid out in the Foreign Intelligence Surveillance Act (FISA), which by its terms purports to provide the exclusive means for authorizing such surveillance. And that is Fisher's primary point: The Bush administration engaged in a program that lacked statutory authorization.

The final chapter describes "extraordinary renditions." Fisher lays out the law of rendition clearly: Until recently – here the Clinton administration is the origin of the new issues, not the Bush administration –

transfers of those in U.S. custody to other nations was governed by statute and treaty (pp.321-24), and such transfers ("renditions") were for the purpose of trial and could not occur if the potential defendant would probably face torture in the receiving nation. Extraordinary renditions occur for purposes other than trial – ordinarily, so that the person transferred to another nation can be interrogated – and, importantly, with only feeble assurances that the person will not be tortured to obtain information. Fisher observes that the Bush administration took the public position that its transfers were indeed authorized by statute and occurred only when the government was "assured" that torture would not occur, but he calls these responses feeble (pp.333-39), offering a detailed critique of a public statement made by Secretary of State Condeleeza Rice.

THE CONSTITUTION AND 9/11 contains a great deal of useful information. As noted earlier, its legal analysis is perhaps too brisk. With respect to the NSA surveillance program and extraordinary renditions, and to some extent with respect to other issues, Fisher is hobbled by the fact that we do not yet know enough about the programs to be able to reach confident legal judgments that extend beyond our prejudices either for or against the Bush administration. It seems likely that the Obama administration will do something to bring more information to light, either through prosecutions or, as now seems more likely, through some sort of investigation commission. At that point legal analysis can be more sure-footed.

Fisher's position on many legal issues could be more nuanced. Here there are two difficulties. Fisher's primary theme is the importance of congressional participation in setting national security policies of the sort that have become controversial since 9/11. Fair enough, but it is equally important to note that the Bush administration generally did claim statutory authorization for its initiatives, primarily in the Authorization for the Use of Military Force (AUMF) [*1077] against those responsible for the 9/11 attacks. (Incidentally, Fisher makes the – to me – questionable assertion that "there was . . . [no] invasion after 9/11" (p.89) that might justify the suspension of *habeas corpus*. Unless we place a great deal of weight on "after" in that formulation, that seems to me wrong: The 9/11 attacks were an invasion, I think, and they would justify the suspension of *habeas corpus* for at least some period afterwards.) Fisher believes that the AUMF should not count as sufficient statutory authorization because neither the language Congress used – "all necessary and appropriate force" – nor any deliberations in Congress indicated in sufficiently specific terms that Congress gave the president the powers he claimed (see, e.g., pp.189-90). Again, this is certainly a defensible position, but Fisher does not explain the source for his standard of specificity – that is, why the AUMF should not count as specific enough.

Second, the historical account Fisher provides is less "civil libertarian" than the tenor of his presentation suggests. Congress and especially the courts tolerated a great deal of procedural sloppiness in immigration matters, for example. And some military tribunals in the Civil War were pretty clearly not authorized by Congress (175-76). Fisher quotes Justice Antonin Scalia on the QUIRIN case: It was "not th[e] Court's finest hour" (p.176). This is almost certainly true, but its significance is less clear. To the extent that historical practices matter in developing constitutional law, as Fisher appears to believe, even "bad" precedents – bad, that is, from the normative perspective adopted by a critic today – have to have some weight. And, of course, supporters of the Bush administration would not concede that the precedents are bad ones: Administrative procedures falling short of the highest levels of due process were approved by the courts in the past, and that provides a basis in historic practice for accepting similarly truncated procedures today; past presidents established military tribunals different from those authorized by Congress, and that supports the Bush administration's decision to do the same. Again, one can fairly dispute these uses of historic practices to support contemporary programs, but doing so requires more argument than Fisher provides.

In sum, THE CONSTITUTION AND 9/11 is worth reading for the factual information it provides about the history of constitutional law dealing with national security. It is full of interesting stories, and is an easy read. Readers can take the information the book provides and use it to assess legal arguments they will find more fully presented by other authors.

CASE REFERENCES:

BUCK v. BELL, 274 U.S. 200 (1927).

HAMDAN v RUMSFELD, 126 S Ct 2749 (2006).

EX PARTE QUIRIN, 317 U.S. 1 (1942).

RUMSFELD v. PADILLA, 124 S.CT. 2711 (2004).

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